Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

LEON LANN and LAW OFFICES OF LEON LANN,
Petitioners

v.

KARYN L. WESTERFIELD and SCOTT W. SMITH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

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23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether substituted service of process upon someone who was completely unknown to defendant and who did not provide defendant with the summons and complaint denies defendant's right to due process where, after service upon the person unknown to defendant, copies of the summons and complaint were mailed to the "person served" and defendant never received actual notice?

2. Whether entry of a default and default judgment constitutes a denial of defendant's right to due process where the default and default judgment are void as a result of improper service of summons?

3. Whether entry of default against defendant denies defendant's right to due process or equal protection where it is entered less than thirty days after the statement of damages was served on defendant?

LIST OF PARTIES

Defendants and Petitioners: Leon Lann and Law Offices of Leon Lann.

Co-Defendant: Thermon Lytle

Plaintiffs and Respondents: Karyn L. Westerfield and Scott W. Smith

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I

OPINIONS BELOW

On February 24, 1993, the California Court of Appeal filed its unpublished opinion affirming a default judgment against petitioners but reversing an award of punitive damages in that judgment. The California Supreme Court denied review without issuing an opinion.

II

JURISDICTION

An opinion of the California Court of Appeal, First Appellate District, was entered on February 24, 1993, affirming a default judgment against petitioners, but reversing the award of punitive

damages in the judgment. The Court of Appeal denied a timely petition for rehearing on March 18, 1993. On May 12, 1993, the California Supreme Court denied petitioners' petition for review. The jurisdiction of this court is invoked under 28 U.S.C. 1257(a).

III

CONSTITUTIONAL PROVISION INVOLVED

The default judgment against petitioners violates the due process requirements of the Constitution's Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV

STATEMENT OF THE CASE

Through ineffective substitute service, a $200,000 default judgment was entered against the defendant attorney office for failure to file a complaint in a $5,000 automobile case, despite the fact that the defendant attorney did file the complaint. The defendants' motion to set aside the default and judgment should have been granted because all of the prerequisites of California Code of Civil Procedure section 473.5 were satisfied. Defendants and petitioners Leon Lann and Law Offices of Leon Lann ("Lann") showed that they did not receive actual notice, acted with diligence in moving to set aside, and have a meritorious defense. Moreover, the judgment is void because of improper service of the summons and complaint, as well as inadequate service of the statement of damages.

In December 1991, petitioner Leon Lann received notice that an abstract of judgment had been filed in the Los Angeles County Recorder's Office constituting a lien on real property owned by him. (Joint Appendix filed in California Court of Appeal ["J.A."] 71, ¶ 5.) The abstract indicated that a judgment in the amount of $200,000 had been entered against him. Prior to receipt of this abstract, Lann had no knowledge that this legal

malpractice action had been filed against him by two former clients. (J.A. 71, ¶ 5)

Upon receiving the abstract, Lann obtained and reviewed a copy of the court's file. (J.A. 71, ¶ 6) That file reveals that on June 19, 1990, a complaint was filed against him, his law office, and an employee named Thermon Lytle for professional negligence and breach of fiduciary duty based on Lann's alleged "fail[ure] to file plaintiffs' lawsuit for personal injuries within the time allowed by law." (J.A. 3:22) However, Lann had timely filed plaintiffs' complaint. (J.A. 82)

There was no personal service on Lann. Plaintiffs had served the summons and complaint, by substitute service, on someone completely unknown to Lann. The proofs of service indicate that service was purportedly effected by serving "Michelle Jones/Over 18 Yrs. Apparently in Charge" on July 5, 1990. (J.A. 78) Although the process server lists the correct address for the Law Offices of Leon Lann, no one has ever been employed in that office with the name Michelle Jones, or any similar name. (J.A. 72, ¶ 7; 97, ¶ 5; 102, ¶ 5; 105, ¶ 6; 108, ¶ 4.) Further, no one employed by Lann at the time of purported service has ever heard of this individual, and no one in Lann's office knew that a complaint had been filed. As a result, Lann never received the summons and complaint and, thus, never filed responsive pleadings.

The language on the proof of service also reflects the invalidity of service. California Code of Civil Procedure section 415.20 provides that, in lieu of personal delivery of a copy of the summons and complaint to the person to be served, a summons and complaint may he served by leaving a copy during usual office hours in the office of the person being served with a person who is apparently in charge, and by thereafter mailing a copy of the summons and complaint "to the person to be served" at the place where a copy of the summons and complaint were left. The proofs of service submitted by the process server here indicate that the summons and complaint were mailed "to the person served" — which was someone named Michelle Jones — rather than, as required by the Code, "the person to be served" — which was Lann.

The statement of damages was also not personally served on Lann. Substitute service was attempted by leaving the statement with an employee on August 30, 1990, and mailing it on September 4, 1990. (J.A. 13) Lann did not receive it. (See J.A. 71, ¶ 5)

The request for entry of default was filed on September 28, 1990, and default was entered the same day. (J.A. 17) Plaintiffs filed a motion for default judgment on March 6, 1991. (J.A. 19) After a default hearing on April 12, 1991, default judgment was entered. (J.A. 50) The judgment was in the amount of $200,000, which represented $25,000 for each plaintiff as damages from the underlying personal injury action, $25,000 for each plaintiff as damages in this malpractice action, and $50,000 for each plaintiff as punitive damages. (J.A. 51) The judgment was never served on Lann.

Lann moved to set aside the default and default judgment on March 4, 1992, less than three months after learning of the action and the judgment. (J.A. 53) He submitted a copy of the complaint timely filed on behalf of the plaintiffs in the underlying action — showing that he had a meritorious defense. (J.A. 82) He also submitted copies of the proof of service on someone completely unknown to him, and other evidence showing that he had no actual notice of this action. Plaintiffs opposed the motion. (J.A. 111-193) The court denied the motion by order entered on March 19, 1992. (J.A. 201)

On May 8, 1992, defendant Lann timely filed a notice of appeal. (J.A. 205) The Court of Appeal reversed only the punitive damage portion of the judgment, and otherwise affirmed.

Petitioners' challenge to the judgment was raised from the inception of the appeal, and was the basis for the motion to vacate the judgment in the trial court and for the appeal of the judgment in the appellate courts. It was referenced throughout the briefs. For instance, petitioners' brief in the California Supreme Court concludes, "The default judgment is void and constitutes a denial of due process under the state and federal constitutions." The courts did not expressly rule upon the issue.

V

REASONS FOR GRANTING THE WRIT

This matter should be reviewed, as provided in Supreme Court Rule 10(c). By affirming the judgment, the California courts have resolved this case in a way that violates the Fourteenth Amendment.

Petitioners' right to due process has been denied by service of process that was not reasonably calculated to provide petitioners with actual notice. The due process clause of the Fourteenth Amendment guarantees the right to notice and an opportunity to be heard and defend oneself. In *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940), the Supreme Court held that substituted service satisfies due process standards only where it is reasonably calculated to give actual notice and an opportunity to be heard.

In this case, the service of process upon someone unknown to petitioners or their employees and subsequent mailing of summons and complaint to that same person fails to meet the *Milliken* standard. The service of the summons and complaint was effected upon someone completely unknown to petitioners and could not have afforded petitioners notice of the action. Service upon someone who is a stranger to petitioners and their employees is not reasonably calculated to give actual notice, and in fact petitioners never received actual notice. The person whom plaintiff served never contacted petitioners regarding the service and petitioners did not learn of the action until Mr. Lann received notice, over fifteen months after the ineffective service, that an abstract of judgment had been filed against him in the Los Angeles County Recorder's Office.

The service of process was improper pursuant to California Code of Civil Procedure section 415.20, and the judgment void for denial of due process, because plaintiff neither left a copy of the summons and complaint with someone who was "apparently in charge" nor mailed a copy of the summons and complaint to "the person to be served," as required by that statute. Petitioners were not provided with the summons and complaint (by the unknown person served or anyone else) and did not have notice of

the action. Because plaintiffs did not comply with Section 415.20 and petitioners were never served with the complaint, entry of judgment denied petitioners an opportunity to defend the action. Enforcement of a judgment which is void for defective service of process denies petitioners their right to due process under the Fourteenth Amendment.

Petitioners' right to due process was denied by the entry of default less than thirty days after service of the statement of damages. Although one line of California cases holds that the default may be entered less than thirty days after service of the statement of damages (*See, Connelly v. Castillo*, 190 Cal.App.3d 1583 (1987)), another line of cases establishes that default cannot be entered less than thirty days after service of the statement of damages. (*Plotitsa v. Superior Court*, 140 Cal.App.3d 755, 761 (1983)). The latter line of cases is properly reasoned and should have been followed here. Those cases explain that, because "a 'statement of damages' under Section 425.11 is the functional equivalent of an amendment to a complaint that increases the amount of damages sought" (*Id.* 759), the same service requirements must apply.[1] Because action cannot be taken for at least 30 days after service of a complaint, 30 days must also be afforded after service of a statement of damages. A default entered without this requisite period is a denial of due process. (*See Id.* 760).

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[1]If the statement of damages is considered equivalent of an amended complaint to which the defendant should have thirty days to respond, the Court's action in this case may also constitute a denial of equal protection.

VI

CONCLUSION

The default judgment is void and constitutes a denial of due process and a violation of the Fourteenth Amendment.

DATED:

Respectfully submitted,

BRONSON, BRONSON & MCKINNON

By: ROXANNE L. HOLMES
Attorneys for Petitioners

(Appendix follows.)

APPENDIX

1. Order Denying Motion to Vacate Judgment
2. California Court of Appeal Opinion
3. California Court of Appeal Order Denying Rehearing
4. California Supreme Court Order Denying Review

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

KARYN L. WESTERFIELD
SCOTT W. SMITH,
Plaintiffs,

v.

LEON LANN, THERMON LYTLE,
LAW OFFICES OF LEON LANN,
DOES 1-10,
Defendants.

No. 666 655-2

FILED
March 19, 1992

Order Denying Motion to Vacate Judgment

Defendants' Motion to Set Aside the Default and Default Judgment came on regularly before the Honorable James R. Lambden, presiding in Department 19 of the above entitled court, on March 19, 1992, each party being represented by counsel.

Upon reviewing the papers filed by all parties, and upon submission of oral argument, and good cause appearing therefor,

IT IS HEREBY ORDERED that defendant's Motion to Set Aside Default and Default Judgment be, and hereby is, DENIED.

DATED: Mar 19, 1992

JAMES R. LAMBDEN
Hon. James R. Lambden
Judge of the Superior Court

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

DIVISION FOUR

KARYN L. WESTEFIELD et al.,
Plaintiffs and Respondents,

v.

LEON LANN et al.,
Defendants and Appellants.

KARYN L. WESTERFIELD et al.,
Plaintiffs and Respondents,

v.

THURMON LYTLE,
Defendant and Appellant.

FILED
February 24, 1993

A057639
(Super. Ct. No. 666655-2 Alameda County)
A058708

California Opinion of the Court of Appeal

In these consolidated appeals defendants and appellants Leon Lann, Thurmon Lytle, and Law Offices of Leon Lann (sometimes referred to as appellants) appeal from orders denying their motions to set aside the defaults and default judgments in favor of plaintiffs and respondents Karyn L. Westerfield and Scott W. Smith (sometimes referred to as respondents) in an action for professional negligence and breach of fiduciary duties.

A default judgment was entered in favor of respondents for $200,000 for legal negligence in failing to prosecute respondents' personal injury (automobile accident) lawsuit for which appellants had been employed. Damages include the worth of the personal injury lawsuit ($25,000), general damages for legal malpractice ($25,000) and punitive damages ($50,000) for each respondent. This appeal challenges the trial court's failure to vacate that default judgment.

Appellants contend: (1) the orders are not supported by the evidence and are an abuse of discretion; (2) the default was untimely; and (3) the damages are improper. We remand for further evidence as to punitive damages, but otherwise affirm.

I

Appellants contend that the orders are not supported by the evidence and are an abuse of discretion. This contention lacks merit.

"Section 473.5, Code of Civil Procedure,[1] . . . permits the court to set aside a default or default judgment against a defendant and allow him to defend the action on its merits if (1) he received through no inexcusable fault of his own, no actual notice of the action in time to appear and defend, and had not made a general appearance; (2) a default or default judgment has been entered against him by the court; (3) he acted with reasonable diligence in serving and filing the notice of motion to set aside the default or default judgment; and (4) he has a meritorious defense." (*Gova v. P.E.R.U. Enterprises* (1978) 87 Cal.App.3d 886, 890-891.)

" 'Where, as here, the trial court denies the motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court's exercise of discretion. [Citation.] Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails. [Citation.] Doubts are resolved in favor of the application for relief from default [citation], and reversal of an order denying relief results [citation].' [Citation.]" (*Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1079.) "The moving party has the burden of showing good cause for relief from a default or a default judgment. [Citation.]" (*Id.*, at pp. 1079-1080.)

An order of the trial court denying the motion " '. . . itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the

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[1] All further statutory references are to the Code of Civil Procedure.

considerations which may have moved the trial court to its conclusion.' " (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 39.)

The applicable standard of review of the facts was set out by the Supreme Court in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, as follows: "The trial court, with declarations and supporting affidavits, was able to assess credibility and resolve any conflicts in the evidence. Its findings relating to lack of notice are entitled to great weight. Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations." (Emphasis in original.) As part of such holding the supreme court specifically disapproved "[a]ny contrary implication" in *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, the case most heavily relied on by appellant Lytle. (*Shamblin. v. Brattain, supra*, at p. 479, fn. 4.)

A default can be based on substituted service, but "strict compliance with the letter and spirit of the statutes is required." (*Olvera v. Olvera, supra*, 232 Cal.App.3d at p. 41.) Listing a party's name in the caption or body of a complaint is sufficient to give notice to the party that he or she is a defendant in the case. (*Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438, 448-449; *Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 547.)

" 'It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. . . . The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant. . . . ' " (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 907, citation omitted.)

In the instant case the caption and allegations of the complaint unambiguously name Lytle as a party defendant. Respondents submitted proof of service declarations averring that Lytle was

personally served at the Oakland office of Lann with the summons, complaint and statement of damages.

Respondents also submitted proof of service declarations averring that Lann and the Law Offices of Lann were validly served with the summons and complaint by means of substituted service pursuant to section 415.20. After two attempts to personally serve Lann were unsuccessful, copies of the summons and complaint were left at his Los Angeles office with Michelle Jones, the person over the age of 18 who was "apparently in charge." On the same day a summons and complaint were mailed to the person served.

Four unsuccessful attempts were made to personally serve Lann with the statement of damages. Thereafter, copies were left at Lann's Los Angeles office with Susie Minassian who was over the age of 18 and "apparently in charge." Five days later copies were mailed to the person served. Requests for entry of default, two separate notices of change of address, and written interrogatories to judgment debtor were mailed to each appellant at the appropriate business address.

Lann submitted several declarations averring that his Los Angeles office was never served and that no person named Michelle Jones was ever employed by him. Lytle's declaration avers that he did not recall being served with any of the mentioned documents. On appeal Lytle also argues that even if he was served, "the complaint [and the allegations therein] would not have apprised him that an action had been filed against him."

Respondents' declarations were properly credited by the trial court and they provide substantial evidence of "strict compliance with the letter and spirit of the statutes" authorizing substituted service on Lann and his office. Thus, the appropriate documents were delivered to his office. Any failure by Lann to receive actual notice could only result from his own inexcusable negligence. Likewise, there is substantial evidence that Lytle was personally served with documents naming him as a party defendant. His failure to act to protect himself constitutes inexcusable negligence.

II

Appellants contend: "[T]he default is invalid and must be set aside because it was entered less than thirty days after service of the statement of damages." This contention lacks merit.

After carefully reviewing the outstanding cases, *California Novelties, Inc. v. Sokoloff* (1992) 6 Cal.App.4th 936, 940-944, held at page 945: "We conclude from the broad language utilized by the *Schwab* [*v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428] court that there is no hard and fast rule regarding the precise method or timing of service of the section 425.11 statement of damages. Rather, we are to determine in each case whether minimum standards of due process have been met." The court then held that proper, reasonable notice was given "by mailing service 17 days prior to entry of default."

Herein, the statement of damages was mailed to Lann on September 4, 1990, personally served on Lytle on August 27, 1990, and default was entered against all appellants on September 28, 1990. Accordingly proper, reasonable notice was given.

III

The judgment awards each respondent general damages for the underlying personal injury action in the amount of $25,000, general damages for the malpractice action in the amount of $25,000 and punitive damages in the amount of $50,000, for a total judgment of $200,000.

Appellants contend that the damages are "unauthorized and improper" because: (1) the malpractice damages were for emotional distress which is not an authorized ground for damages in such cause of action; and (2) punitive damages were awarded without a showing of appellants' net worth. The latter contention has merit; the former does not.

In an appeal from a default judgment the power of an appellate court to review the trier of fact's determination of damages is limited to a determination of whether the damages are totally unconscionable or without evidentiary justification. (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 363-364.)

Damages for emotional distress are not recoverable in a "garden variety claim of legal malpractice" where there is "no suggestion of bad faith or reckless indifference to the plaintiff's interest in emotional tranquillity." (*Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 6, 11.) However, they are recoverable in an action against an attorney for breach of a fiduciary duty by failing to keep the client informed or failing to advise consultation with an independent counsel when a conflict arises between the attorney and client. (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 717-718.)

The complaint herein alleged a cause of action for breach of fiduciary duties. At the default judgment hearing respondent Westerfield testified that after she retained appellants' office, through Lytle, to file a personal injury complaint, she "never heard from him again." She telephoned appellants' office on several occasions, but either the receptionist hung up, or she was "left on hold." No response was made to her certified letters even though Lytle signed for the letters. After she retained another attorney Lann called her and proposed a settlement. He would not state if he was trying to settle the original personal injury action or a potential malpractice suit. Lann did not advise her to see an independent counsel.

Appellants' rude conduct and utter disregard of respondents' attempts to learn about their case strongly suggests bad faith and a reckless indifference to respondents' interest in emotional tranquillity. Thus, emotional distress damages are not proscribed by the rule of *Merenda*. Moreover, appellant's acts fall directly under the ambit of *Betts*. Accordingly, the damages for emotional distress were proper.

Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, 301-302, held that a default judgment for punitive damages was not supported by the record because of a lack of adequate evidence of the defendant's net worth. The court reversed and remanded the case to the superior court for further evidence. At pages 302-303, it held that the defendant "is not entitled to participate in any manner in the second judgment hearing on the issue of its net worth." Since no evidence of appellants' net worth was presented

at the hearing herein, we reverse and remand the judgment of $100,000 punitive damages on the same conditions.

DISPOSITION

The judgment of punitive damages is reversed and remanded to permit evidence of appellants' net worth. Appellants are not to affirmatively participate in such hearing (see *Barragan v. Banco BCH, supra*, 188 Cal.App.3d at pp. 302-303). Otherwise the judgment is affirmed. Appellants to bear all costs on appeal.

Anderson, P.J.

We concur:

Perley, J.

Reardon, J.

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

KARYN L. WESTERFIELD et al.

v.

LEON LANN et al.
A057639
Alameda County
Sup. Ct. No. 6666552

KARYN L. WESTERFIELD et al.

v.

THURMON LYTLE
A058708

FILED
March 18, 1993

California Court of Appeal Order Denying Rehearing

BY THE COURT:

The petition for rehearing in consolidated appeals A057639 and A058708 is denied.

Dated: March 18, 1993

ANDERSON, P.J.

First Appellate District, Division Four,
Nos. A057639, A058708, S031998

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

KARYN L. WESTERFIELD et al., Respondents

v.

LEON LANN et al., Appellants
And Companion Case

California Supreme Court Order Denying Review

Appellants' petition for review DENIED.

LUCAS
Chief Justice